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No. 624

In the Supreme Court of the United States

OCTOBER TERM, 1960

KELCO INDUSTRIES, INC., A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF OHIO, 2438 BEEKMAN STREET, CINCINNATI 14, OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The United States Court of Claims did not file an opinion. The order of the court, granting respondent's motion for summary judgment and dismissing the petition, is set forth at Pet. App. B, p. 12.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 18, 1960. Petitioner, on March 25, May 25, and July 13, 1960, was granted successive extensions of time, totaling 180 days, in which to file a motion for re-hearing or for relief from the judgment or order. Petitioner filed a motion for re-

hearing on September 13, 1960, which was denied on October 5, 1960. The petition for a writ of certiorari was filed on January 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether an unsuccessful bidder on a Government contract has a right to be reimbursed by the United States for expenses incurred incident to the preparation of its bid when the bid was rejected as nonresponsive to the requirements of the invitation to bid.

STATUTE INVOLVED

10 U.S.C. 2305 is set forth at Pet. App. A, p. 11.

STATEMENT

On June 13, 1957, the contracting officer at Gadsden Air Force Base, Alabama, made a joint determination with the Small Business Administration representative to set aside a prospective procurement of MA-7 and MA-8 air conditioners for award to small business concerns (Exhibit 1).[1] Following this determination, the contracting officer issued Invitation for Bids No. 01-608-58-1 on July 25, 1957 (Exhibit 2). On August 8, 1957, a representative of the Wright Air Development Center (Wright) conducted a "Group Builders Conference," which petitioner attended, to discuss the technical aspects of the procurement (Exhibit 3.) Thereafter, on September 26, 1957, petitioner's bid was submitted (Exhibit 2), and,

[1] Exhibits 1–16 have been lodged with the Court in original form. A summary of the contents of each Exhibit is printed in Appendix A, *infra*, pp. 10–11.

along with fourteen other bids, was opened on September 27, 1957, at the Gadsden Base (Exhibit 3–A).

By letter dated October 25, 1957, the Consolidated Diesel Electric Corporation claimed that the bids of the Recony Corporation and petitioner were non-responsive to the requirements of the Invitation for Bids and should be disallowed (Exhibit 4). As a result of this protest, on November 19, 1957, the contracting officer requested Wright to evaluate the descriptive literature submitted by petitioner with its bid (Exhibit 5, p. 1).[2] On December 19, 1957, Wright determined that petitioner's descriptive literature was

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[2] The provisions of the Invitation for Bids contained, *inter alia:*

> X. DESCRIPTIVE LITERATURE:
>
> 1. All bidders under this Invitation for Bids will be required to submit to the Government the descriptive literature listed below. Such literature shall be submitted with the bids and shall conform in every respect with the requirements of the Invitation for Bids. Sinch [sic] descriptive literature is required for evaluating bids, nonconforming literature shall result in rejection of that bid. The descriptive literature relative to design approaches, etc., which will be required for evaluation purposes is as follows:
>
> * * * * * *
>
> 2. Failure of a bidder to have furnished descriptive literature will result in rejection of that bid. However, the bid will not be rejected if the bidder has previously offered a product which has been previously procured so that additional descriptive literature would not add to the Government's knowledge of the acceptability of the product. The Contracting Officer will verify that the product previously procured id [sic] adequate to meet the requirements of this Invitation for Bids. Upon verification, the requirements for furnishing descriptive literature may be waived as to that bidder.

non-responsive (Exhibit 5, pp. 2–5). Thereafter, on January 8, 1958, the contracting officer advised petitioner (Exhibit 6) that its bid was being rejected as being non-responsive, pursuant to Section X of the Invitation for Bids (footnote 2, *supra*).

The rejection of its bid was immediately protested by petitioner (Exhibit 7 and 8), which asserted that the reasons for the rejection were only minor informalities or irregularities which did not go to the substance of the bid and could be corrected without expense to the Government or prejudice to other bidders. It further noted that it understood that its bid was being forwarded to Headquarters, United States Air Force, for processing to the General Accounting Office (Exhibit 9).

Subsequently, on January 29, 1958, petitioner was advised by letter that the Air Force had decided to waive the requirement pertaining to the submission of descriptive material with its bid, since petitioner had previously supplied air conditioners of a similar, but not identical, type to the Air Force contractors (Exhibit 10). The letter specifically stated that it was written to inform petitioner of the action taken by the Air Force, and was not to be interpreted as a notice of award.

On February 12, 1958, Recony Corporation requested information concerning the waiver of the descriptive-literature requirement so that it could better formulate a protest of the contemplated award of a contract to petitioner (Exhibit 11). On February 25, 1958, petitioner was advised that Recony had protested the waiver, that the matter had been referred

to the Comptroller General for an opinion, and that the making of awards would be held in abeyance pending the Comptroller General's advice (Exhibit 12). On March 31, 1958, the Comptroller General determined that petitioner's bid was not responsive and should be rejected (Exhibit 13). This determination was sustained on May 15, 1958, after review of a request for reconsideration filed by petitioner (Exhibit 14). Thereafter, on June 23, 1958, petitioner protested the making of an award to any other bidder on the ground that the Invitation for Bids was ambiguous (Exhibit 15). Petitioner was advised by the Air Force on June 27, 1958, that its protest was without merit and was notified that the Air Force would proceed to award the contract to the lowest responsible bidder (Exhibit 16).

On September 15, 1958, petitioner filed its petition in the Court of Claims seeking to recover $44,940.00, which it asserted to be the amount it expended in the preparation of its bid and the expenses incident thereto. It further asserted that the action of the Air Force and the Comptroller General had been "unlawful, illegal, erroneous and arbitrary" and that as a result of such action petitioner was denied the right to recoup its expenses. Respondent's motion for summary judgment was granted on March 18, 1960, and the petition was dismissed.

ARGUMENT

By its action in the Court of Claims, petitioner, an unsuccessful bidder for a Government contract, seeks reimbursement from the United States for amounts allegedly expended in preparation of its bid and for

expenses incident to its bid. But an invitation by the United States to bid carries no express or implied obligation that unsuccessful bidders will be reimbursed by the United States for their expense. The order of the Court of Claims (Pet. App. B, p. 12), granting summary judgment for the Government and dismissing the petition, is clearly correct. And since the case raises no questions of general importance, but turns on the particular circumstances, review by this Court is not warranted.

1. Petitioner's reliance (Pet., p. 4) upon *United States* v. *Purcell Envelope Co.*, 249 U.S. 313, is misplaced. The judgment awarded in that case was based upon the breach by the United States of an express contract which came into being when Purcell's low bid was accepted by the entry of a formal order by the Post Office Department, and when Purcell, at the Department's direction, executed and returned a contract to the Department. In contrast to the facts in *Purcell*, petitioner in the present case was notified by the Air Force on February 25, 1958, that, because the Recony Corporation had protested the Air Force decision to waive the descriptive-literature requirement in the Invitation for Bids, the matter was being referred to the Comptroller General for a ruling, and that the award of the contract would be held in abeyance pending the advice of the Comptroller General (Exhibit 12). On March 31, 1958, the Comptroller General advised the Air Force that petitioner's bid was non-responsive to the requirements of the Invi-

tation for Bids and should be rejected (Exhibit 13).[3] The facts in petitioner's case are, then, entirely dissimilar from those in *Purcell* and permit of no argument that administrative discretion in the award of the Air Force contract was exhausted at any point prior to the award of the contract to another bidder following the Comptroller General's decision that petitioner's bid was non-responsive.[4]

2. Petitioner's reliance (Pet., p. 5) upon 10 U.S.C. 2305(c) to support its claim for reimbursement is also without merit. Like other statutory provisions governing Government procurement, that provision is for the benefit of the Government and the public, and does not confer litigable rights or standing to sue upon unsuccessful and disappointed bidders. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125–127. Moreover, 10 U.S.C. 2305(c) goes no further than to state that contract awards "shall be made with reasonable

[3] The letter of January 29, 1958, from Gadsden Air Force Depot to petitioner (Exhibit 10) informing it of the determination of the contracting officer to waive the descriptive-literature requirement is the only item to which petitioner can point to substantiate its position. That letter, however, antedated the Recony Corporation's protest and specifically stated that it was written only to inform petitioner of the action taken and was in no way to be interpreted as a notice of award.

[4] Following Recony Corporation's protest, the Air Force acted in strict accord with Air Force procurement instructions in submitting the question of the responsiveness of petitioner's bid to the Comptroller General. Air Force Procurement Instruction, Sec. II, Part 4, ¶ 2-407 (Exhibit 17, Appendix B, *infra*, pp. 12–13).

promptness * * * to the responsible bidder *whose bid conforms to the invitation* * * *" (emphasis added). Petitioner's bid was rejected because it did not conform to the descriptive-literature requirement in the Invitation for Bids. Though petitioner contends that this determination was erroneous (Pet., p. 9), the decision was one for the administrative authority to make and was in fact made in strict conformity with applicable procurement instructions of the Air Force (see footnote 4, *supra*, and Appendix B, *infra*, pp. 12–13).

3. Finally, petitioner's reliance (Pet., p. 6) on *Heyer Products Co.* v. *United States*, 135 C. Cls. 63, 71, in which the Court of Claims held that an unsuccessful bidder could recover when there is proof of "a fraudulent inducement for bids * * * with the intent to wilfully, capriciously, and arbitrarily disregard the obligation to let the contract to him whose bid was most advantageous to the Government," is similarly without substance. The decision of the Comptroller General, that petitioner's bid was non-responsive, and the Air Force's rejection of petitioner's bid in accordance with this decision, were neither arbitrary, capricious nor fraudulently motivated. Section X of the Invitation (footnote 2, *supra*) provided alternative methods for submitting descriptive literature. Section X–1 required that descriptive literature listed be submitted with the bid. The section specifically stated that this literature must "conform in every respect" with the requirements of the Invitation, that the literature was "required for evaluating bids," and

that nonconforming literature would result in "rejection of that bid."

Petitioner submitted descriptive literature with its bid. It was evaluated, and was found to be non-responsive (Exhibit 5, pp. 2–5), and petitioner was so notified in detail (Exhibit 6). The evaluation showed that petitioner's product deviated from specifications; that petitioner failed to submit required data, or that the data were incomplete; and that the literature that was submitted contained inaccuracies and design errors (Exhibits 5 and 6). Based on this evaluation, petitioner's bid was rejected (Exhibit 6). In such circumstances, there is nothing in petitioner's case to bring it within the Court of Claims' ruling in *Heyer Products Co.* v. *United States, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JANUARY 1961.

APPENDIX A

The following are a list and summary of exhibits lodged in this Court in their original form:

Exhibit 1—Joint Set-Aside for Small Business, SBA Form 70, dated 13 June 1957.

Exhibit 2—Invitation for Bids, dated 25 July 1957, and Bid of Keco Industries, Inc., dated 26 September 1957.

Exhibit 3—Report of Group Bidders Conference, 8 August 1957.

Exhibit 3A—Abstract of Bids opened at Gadsden Air Force Base, 27 September 1957.

Exhibit 4—Letter, dated October 25, 1957, from Consolidated Diesel Electric Corporation to Gadsden Air Force Depot.

Exhibit 5—Letter, dated November 19, 1957, from Gadsden Air Force Depot to Wright Air Development Center, and reply thereto, dated December 19, 1957.

Exhibit 6—Letter, dated January 8, 1958, from Gadsden Air Force Depot to Keco Industries, Inc.

Exhibit 7—Telegram, dated January 8, 1958, from Keco Industries, Inc.

Exhibit 8—Letters, dated January 10 and January 17, 1958, from Keco Industries, Inc., to Gadsden Air Force Depot.

Exhibit 9—Telegram, dated January 28, 1958, from Keco Industries, Inc., to Gadsden Air Force Depot.

Exhibit 10—Letter, dated January 29, 1958, from Gadsden Air Force Depot to Keco Industries, Inc.

Exhibit 11—Letter, dated February 12, 1958, from Recony Corporation to Gadsden Air Force Depot.

Exhibit 12—Letter, dated February 25, 1958, from Gadsden Air Force Depot to Keco Industries, Inc.

Exhibit 13—Letter, dated March 31, 1958, from the Comptroller General to the Secretary of the Air Force.

Exhibit 14—Letters, dated May 15, 1958, from the Comptroller General to the Secretary of the Air Force and to Keco Industries, Inc.'s attorneys.

Exhibit 15—Telegram, dated June 23, 1958, from Keco Industries, Inc. to Headquarters, Mobile Air Material Area.

Exhibit 16—Joint Messageform, dated June 27, 1958, from Headquarters, Mobile Air Material Area to Keco Industries, Inc.

APPENDIX B

EXHIBIT 17

AIR FORCE PROCUREMENT INSTRUCTION

Section II. Procurement by Formal Advertising.
Part 4. Opening of Bids and Award of Contracts.
¶2–407. Information to Bidders.

* * * * *

(e) *Notice of Protest Against Award.*

(1) Notice will be given promptly to all bidders affected of any protest or objection against the awarding of a contract to any particular bidder so that, if the interested parties desire, they may take action in their own behalf before further steps are taken in the matter of awarding the contract.

(2) Contracting officers will accept all protests or objections to the award of a contract whether submitted by a bidder or non-bidder. If the protest is submitted orally, the contracting officer will advise the protester that this Instruction requires the protestor [sic] to confirm his protest in writing within such time as the contracting officer may require and that award will be withheld at least until that time has expired. If the written protest is not received within the required time, the oral protest may be disregarded and award made in the normal manner unless the contracting officer, upon investigation, believes that remedial action is required, in which event such action will be taken. If the written protest is received within the required time, the contracting officer will investigate the matter and decide whether the protest is, in his opinion, valid. If

his conclusion is affirmative, he will take necessary action to rectify the erroneous action. If his conclusion is negative, the contracting officer will make a written statement of his opinion in the matter, supported by copies of all pertinent papers. The contracting officer will submit the protest and statement directly to the Director of Procurement and Production, Hq USAF, for *submission to the Comptroller General for decision*, and send a copy to the Commander, AMC, attn: MCPPP, if an AMC field procurement activity or AF local purchase activity is involved. The letter of transmittal should be forwarded by the most expeditious means and marked "IMMEDIATE ATTENTION—PROTEST AGAINST AWARD." The contracting officer will be guided by the decisions of the Comptroller General. Previous Comptroller General decisions on this subject are as follows: 13 Comp. Gen. 315 and 16 Comp. Gen. 497. Submission of protests to the Comptroller General under this paragraph may be dispensed with by the contracting officer if he is satisfied that the protest is without any reasonable degree of foundation or that it was made solely to obstruct and hinder the contracting officer or the otherwise successful bidder. In such case, the contracting officer on his own responsibility, or after asking such advise [sic] as he may desire, may disallow the protest, advising the protester in writing and, if an AMC field procurement activity or AF local purchase activity is involved, forwarding a copy of the correspondence and explanatory remarks to the Commander, AMC, attn: MCPPP [emphasis added].